Filed 11/21/13 Hakakha V. Rucker CA2/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

FARAMARZ BENJAMIN HAKAKHA, Plaintiff and Appellant, v. FRED RUCKER et al., Defendants and Respondents.	B246103 (Los Angeles County Super. Ct. No. SC103382)

APPEAL from a judgment of the Superior Court of Los Angeles County. Richard A. Stone, Judge. Affirmed.

Schreiber & Schreiber, Edwin C. Schreiber, Eric A. Schreiber, Ean M. Schreiber for Plaintiff and Appellant.

Boren, Osher & Luftman, Stephen Z. Boren, Eugenia Castruccio Salamon for Defendants and Respondents.

A lawyer failed to answer after being served with a complaint for malpractice. He sought relief from default on the grounds that he was undergoing treatment for leukemia, with side effects that hindered his ability to cope. Exercising its discretion, the trial court granted the lawyer relief from default. (Code Civ. Proc., § 473.)[1] We see no abuse of discretion and affirm.

FACTS

Plaintiff Faramarz Benjamin Hakakha retained defendant Fred Rucker to represent him in an attorney-client fee dispute/legal malpractice action, a case that plaintiff lost at trial in 2009. After losing the underlying action, plaintiff sued Rucker, claiming that Rucker's legal representation fell below the standard of care and constituted professional negligence. Plaintiff also alleged a breach of contract that absolves him from paying Rucker's fees and costs.

Rucker was served with plaintiff's lawsuit on June 11, 2009. Plaintiff made two unavailing attempts to enter default, both rejected by the trial court due to defective service on Rucker. Default was finally entered against Rucker on December 23, 2009. Rucker sought relief from default on April 27, 2010.

Rucker declared that he has practiced law for 32 years.[2] In 2004, he was diagnosed with a potentially fatal form of leukemia and began treatment with a medication called Gleevec. Initially, Rucker suffered few side effects, but his doctors increased the dosage by 50 percent because he was not responding quickly enough to treatment. "As soon as the dosage was increased I became extremely fatigued, lethargic and emotionally depressed, all of which are known side effects of Gleevec treatment." Eventually, Rucker "became so depressed that I was psychologically paralyzed, unable to complete my work."

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1 Unlabeled statutory citations in this opinion are to the Code of Civil Procedure.

2 Plaintiff objected to Rucker's declaration, but did not secure evidentiary rulings.

When the complaint was served in this action, Rucker was "too depressed to even file an answer, even though I knew that it was without merit and that it was being filed to avoid paying me the fees which were then due. Also at that time I lost my last employee who had been helping me keep track of documents and helping to assure that most matters were dealt with in a timely manner. I soon forgot that the Complaint had even been served and the papers became buried in stacks of other papers in my office." He filed a motion for relief from default five days after his new assistant uncovered the complaint. Rucker's proposed answer to the complaint is attached to his motion.

In opposition, plaintiff argued that mandatory relief is not available to a lawyer acting in propria persona. Plaintiff also contended that Rucker's declaration "is unsupported by any admissible medical evidence," and that Rucker was able to function as an attorney in other cases during the time period in question and "made a conscious decision to set aside default papers in a pile in order to deal with them later." Plaintiff's position is that Rucker's neglect was inexcusable. Plaintiff declared that when he retained Rucker in 2007, Rucker did not appear ill or depressed, and did not disclose that he was undergoing leukemia treatment that caused fatigue and discomfort and prevented him from attending to his business obligations.

In reply, Rucker took exception to plaintiff's attempt to question the severity of his illness and the side effects of Gleevec, and noted that plaintiff submitted no evidence of any prejudice that would ensue if relief from default were granted. Rucker argued that public policy favors resolution of disputes on the merits. Rucker attached a copy of his current Gleevec prescription and a declaration from his treating physician, hematologist Stephen Forman. Dr. Forman confirmed Rucker's leukemia diagnosis and use of Gleevec to keep the disease in check. Dr. Forman has studied and written articles about the effects of Gleevec. He declares, "One of the well-known and recognized side effects of Gleevec can be significant depression in the patient" that may be compounded by edema, which Rucker "has suffered for some time."

THE TRIAL COURT'S RULING

The court granted discretionary relief from default. It cited (1) statutory authority allowing relief from an order taken against a party due to mistake, inadvertence, surprise or excusable neglect; (2) a strong public policy favoring resolution of disputes on the merits; and (3) Rucker's prompt move to obtain relief and the lack of prejudice to plaintiff. Though plaintiff's arguments are "somewhat persuasive," the court exercised its power to vacate the default based on Rucker's declaration.[3]

DISCUSSION

An order granting a motion to vacate a default entered by the clerk is appealable when the case reaches judgment: "Any issue relative to the granting of defendant's motion to set aside the default can be presented on appeal from the judgment." (*Veliscescu v. Pauna* (1991) 231 Cal.App.3d 1521, 1523, fn. 1; *Leo v. Dunlap* (1968) 260 Cal.App.2d 24, 25; *Misic v. Segars* (1995) 37 Cal.App.4th 1149, 1154.) This case finally ended on September 28, 2012. (See fn. 3, *ante*.) The appeal was timely filed on November 26, 2012.

The trial court granted discretionary relief from default. "The court may, upon any terms as may be just, relieve a party . . . from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect." (§ 473, subd. (b).) As a matter of public policy, appellate courts are favorably disposed to affirming a trial court's decision to "permit, rather than prevent, the adjudication of legal controversies upon their merits." (*Benjamin v. Dalmo Mfg. Co.* (1948) 31 Cal.2d 523, 525; *Zamora v. Clayborn Contracting Group, Inc.* (2002) 28 Cal.4th 249, 255-256.) The trial court's decision to grant relief will not be disturbed absent a clear abuse of discretion, construing the affidavits in favor of the prevailing party. (*Zamora,* at pp. 257-258; *Lynch v. Spilman* (1967) 67 Cal.2d 251, 259.)

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3 Once default was vacated, the case continued until September 28, 2012, when it was dismissed as a terminating sanction after plaintiff failed to obey discovery orders.

Section 473 is liberally applied when "the party in default moves promptly to seek relief, and the party opposing the motion will not suffer prejudice if relief is granted. [Citations.] In such situations 'very slight evidence will be required to justify a court in setting aside the default.' . . . [¶] Moreover, because the law strongly favors trial and disposition on the merits, any doubts in applying section 473 must be resolved in favor of the party seeking relief from default. . . . Therefore, a trial court order denying relief is scrutinized more carefully than an order permitting trial on the merits." (*Elston v. City of Turlock* (1985) 38 Cal.3d 227, 233 (*Elston*).)

The affidavit submitted by the moving party must demonstrate "reasonable cause for the default." (*Elston*, *supra*, 38 Cal.3d at p. 234.) In *Elston*, counsel declared that two attorneys recently left his firm; he was understaffed; he was extensively involved in other business and litigation matters; and he "misplaced" plaintiff's papers and "was not aware of it" until he received a notice of default. The Supreme Court wrote that this constituted a "showing of excusable neglect [and] the trial court *should have granted* the section 473 motion." (*Ibid*. Italics added.)

Here, Rucker declared that "I lost my last employee who had been helping me keep track of documents [and] I soon forgot that the Complaint had even been served and the papers became buried in stacks of other papers in my office." The lack of staff to calendar incoming papers was compounded by Rucker's mental and physical incapacity stemming from medical treatment. There is no meaningful distinction between *Elston* and the case at bench. If anything, this is a more compelling case for relief than *Elston*, in light of Rucker's potentially fatal illness. Surely, if the Supreme Court opines that section 473 relief "should" be granted when a lawyer is too busy or too understaffed to keep track of his obligations, then relief should be similarly granted when a lawyer is understaffed, is being treated for leukemia, and misplaces papers.

Once Rucker's new assistant located plaintiff's papers, he moved expeditiously within five days to seek relief. Plaintiff's opposition to the motion discloses no prejudice from the delay. Plaintiff does not argue on appeal that he was prejudiced by the four-month gap between entry of default and Rucker's motion to set aside the default.

Plaintiff's failure to show prejudice militates in favor of granting relief. (*Elston*, *supra*, 38 Cal.3d at p. 235.) As in *Elston*, law office understaffing alone—in the absence of prejudice to the plaintiff—is enough to establish excusable neglect.

Plaintiff asserts that Rucker's declaration regarding his illness and his response to Gleevec is inadmissible because it was not offered by a physician. Rucker subsequently offered the declaration of Dr. Forman, who confirmed Rucker's leukemia diagnosis and averred that depression is a well-known side effect of Gleevec, a topic of scholarly analysis for Dr. Forman. Plaintiff does not challenge Dr. Forman's expertise.

When defaults are caused by counsel's illness, the courts have not required medical testimony to establish the nature or gravity of the illness before granting relief under section 473. (See *Contreras v. Blue Cross of California* (1988) 199 Cal.App.3d 945, 951 [excusable neglect shown when counsel declared that a fractured arm impaired "her mobility and writing ability"]; *Robinson v. Varela* (1977) 67 Cal.App.3d 611, 616 [excusable neglect in failing to file an answer shown by "the press of business at defense counsel's office arising from the [unspecified] illness of the chief trial attorney, the limited office hours during Christmas week, and defense counsel's preoccupation with other litigated matters"]; and *Arnke v. Lazzari Fuel Co.* (1962) 202 Cal.App.2d 278, 279-282 [excusable neglect in failing to answer a complaint when counsel declared that he "'has been ill and under the care of a physician'"].) The reasoning in the cited cases applies with equal force to a party who is acting as his own attorney.

At the hearing in this case, plaintiff conceded that Rucker has leukemia and that "medically caused problems" are grounds for relief. His objection was that Rucker failed to prove he was suffering side effects from medication used to treat the leukemia. The trial court believed Rucker's declaration that he was "extremely fatigued," "psychologically paralyzed" and "too depressed to even file an answer" as a result of his leukemia treatment. The trial court decides the credibility of witnesses, a determination that cannot be reweighed on appeal. (*Johnson v. Pratt & Whitney Canada, Inc.* (1994) 28 Cal.App.4th 613, 622-623.) Rucker's declaration provides the "'very slight evidence'" needed to justify relief from default. (*Elston*, *supra*, 38 Cal.3d. at p. 233.)

DISPOSITION

The judgment is affirmed.

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BOREN, P.J.

We concur:

CHAVEZ, J.

FERNS, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.